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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

8 RITCHIE BROS. AUCTIONEERS
9 (AMERICA) INC.,

10 Plaintiff,

11 v.

12 NAEM SUID, et al.,

13 Defendants.

Case No. C17-1481-MAT

ORDER RE: MOTION TO DISMISS

14
15 INTRODUCTION

16 Defendants Naem Suid (Naem), Mohammad Suid (Mohammad), and Suid Trucking, LLC
17 (Suid Trucking) filed a Motion to Dismiss the Complaint filed by plaintiff Ritchie Bros.
18 Auctioneers (America) Inc. (“Ritchie Bros.”). (Dkt. 14.) Defendants request oral argument and
19 sanctions. Plaintiff opposes the motion. (Dkt. 18.)¹ The Court, finding oral argument
20 unnecessary, herein GRANTS in part and DENIES in part defendants’ motion (Dkt. 14) for the
21 reasons set forth below.

22
23 ¹ As discussed below, Ritchie Bros. presents opposing arguments only as to Naem and Suid Trucking given
Mohammad’s pending bankruptcy proceeding and the resulting automatic stay.

1 BACKGROUND

2 Ritchie Bros. provides auction services for the sale of large equipment. On February 15,
3 2016, Naem and his son Mohammad participated as bidders in an auction held by Ritchie Bros. in
4 Orlando, Florida. (*See* Dkt. 1.) Naem and Mohammad each signed a written Bidder Registration
5 Agreement (Agreement(s)) stating:

6 Bidder, whether acting as principal, agent, officer or director of a company or
7 otherwise, in any capacity whatsoever, and the company he represents, both jointly
8 and severally agree . . . to be responsible for the payment of the purchase price and
taxes on all Purchases made using the Bidder Number regardless of whether it is in
the Bidder's possession or not[.]

9 (*Id.*, ¶4.8 and Exs. A-B.) The Agreements state “[a]ny outstanding balance must be paid within
10 seven (7) days of the completion of the auction.” (*Id.*, Exs. A-B.) They provide for the resale of
11 purchased items if the total purchase price is not paid within the prescribed time and payment by
12 the bidders of any outstanding deficiencies following such resale. (*Id.*) The terms of the
13 Agreements are governed by and interpreted under the laws of the State of Washington. (*Id.*)

14 Purchases at the auction made pursuant to bidder number 743, assigned to Naem, and to
15 bidder number 4784, assigned to Mohammad, were valued at a total of \$238,737.50 and
16 \$336,972.50 respectively. (*Id.*, ¶¶ 4.13-4.14, Exs. A-D.) Neither Naem, nor Mohammad tendered
17 payment for the purchased equipment. On March 25, 2016, Ritchie Bros. sent letters to Naem and
18 Mohammad requesting payment within seven days, and warning them Ritchie Bros. otherwise
19 would resell the purchased equipment and pursue deficiencies owed after resale. (*Id.*, ¶4.18.)
20 Again, neither individual tendered payment and, after resale, deficiencies of \$53,342.50 (bidder #
21 743) and \$116,862.50 (bidder # 4784) remained. (*Id.*, ¶4.19.) On September 29, 2017, Ritchie
22 Bros. filed this suit, alleging breach of contract and action in debt for the principal amount of
23 \$170,205.00. (*Id.*, ¶¶ 5.1-5.11.)

1 Plaintiff alleges Naem placed his bids either personally or through Mohammad, and that
2 Mohammad participated in the auction as an agent and on behalf of his company, Suid Trucking,
3 without disclosing that fact when he signed the Agreement and placed bids. (*Id.*, ¶¶4.13-4.16.)
4 Plaintiff alleges Naem's attorney, Stephen Stone, informed Ritchie Bros.' counsel, on July 28,
5 2017, that Mohammad participated in the auction on behalf of Suid Trucking. (*Id.*, ¶4.22.)
6 Plaintiff avers defendants acted in concert as bidders at the auction and agreed to be responsible,
7 jointly and severally, for the equipment purchased. (*Id.*, ¶¶4.17, 5.2)

8 Defendants deny plaintiff's allegations and move to dismiss claims against Suid Trucking
9 for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil
10 Procedure 12(b)(6), as to all defendants for lack of subject matter jurisdiction, pursuant to Rule
11 12(b)(1), and as to Naem for insufficient service of process, pursuant to Rule 12(b)(5). Defendants
12 also request Rule 11 sanctions.

13 DISCUSSION

14 A. Bankruptcy Stay

15 In its opposition to the motion to dismiss, Ritchie Bros. advised the Court Mohammad filed
16 for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Middle District
17 of Florida on October 10, 2017. *See In re Suid*, No. 17-06532-KSJ (M.D. Fla.).² Given the
18 automatic stay imposed by 11 U.S.C. § 362(a), Ritchie Bros. refrained from addressing the motion
19 to dismiss as related to Mohammad, while opposing the motion as to non-debtor defendants Naem
20 and Suid Trucking in order to preserve its rights in this action. (Dkt. 18.) Counsel for plaintiff
21 attests he informed the bankruptcy trustee and bankruptcy counsel as to this course of action, and
22 was told there would be no opposition. (Dkt. 19.) Ritchie Bros. requests the opportunity to seek
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² Plaintiff asserts it learned of the bankruptcy filing after serving Mohammad.

1 relief from the automatic stay in order to oppose the motion to dismiss as to Mohammad should
2 the Court allow Mohammad to proceed with the motion.

3 Defendants had not filed a Notice of Bankruptcy Stay or advised the Court of the
4 bankruptcy filing in their motion to dismiss. In their reply, defendants assert the automatic stay
5 does not prevent the dismissal of claims against Naem or Suid Trucking, and maintain this matter
6 should, in any event, be dismissed in its entirety against all defendants. (Dkt. 23-1.)³

7 Pursuant to 11 U.S.C. § 362(a)(1), a bankruptcy petition operates as an automatic stay,
8 applicable to all entities, of “the commencement or continuation, including the issuance or
9 employment of process, of a judicial, administrative, or other action or proceeding against the
10 debtor that was or could have been commenced before the commencement” of the bankruptcy
11 proceeding, “or to recover a claim against the debtor that arose before” the bankruptcy proceeding
12 commenced. There is no question that, pursuant to § 362(a)(1), the bankruptcy filing stays the
13 continuation of judicial proceedings against Mohammad.

14 This Court can, in certain circumstances, dismiss an action against a defendant engaged in
15 bankruptcy proceedings. Dismissal of an action against a debtor is “permissible so long as it is
16 ‘consistent with the purpose of the statute.’” *Dean v. Trans World Airlines, Inc.*, 72 F.3d 754, 755
17 (9th Cir. 1995) (quoting *Indep. Union of Flight Attendants v. Pan Am. World Airways, Inc.*, 966
18 F.2d 457, 459 (9th Cir. 1992) (hereinafter “IUFA”)). Section 362(a) serves two broad purposes:
19 (1) it “provides debtors with protection against hungry creditors[,]” and (2) it “assures creditors
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21 ³ Defendants request the Court’s acceptance of a revised reply given objections from plaintiff that
22 the original reply was over-length and contained a misrepresentation. (See Dkts. 22, 23, and 23-1.) The
23 revised reply remains over-length and, as with the original, was not preceded or accompanied by a motion
to file an over-length brief. See Local Civil Rule (LCR) 7(e)(3) and 7(f). Nonetheless, in the interest of
considering all arguments and responses made by the parties, the Court accepts the filing of the revised,
over-length reply brief. (Dkt. 23-1.)

1 that the debtor's other creditors are not racing to various courthouses to pursue independent
2 remedies to drain the debtor's assets[.]” *Id.* at 755-56.

3 Courts have allowed for dismissal of a debtor defendant where there was no “continuation”
4 of an action. For example, dismissal for failure to prosecute did not violate an automatic stay
5 where the court “was not required ‘to consider other issues presented by or related to the underlying
6 case[.]’” and the dismissal could not harm the debtor defendant, did not intrude on the debtor’s
7 “‘breathing space’”, and did not threaten other creditors by giving preference to the plaintiff.
8 *O’Donnell v. Vencor, Inc.*, 466 F.3d 1104, 1110 (9th Cir. 2006) (quoting *Dean*, 72 F.3d at 756,
9 and *IUFA*, 966 F.2d at 458-59). Dismissal of a debtor defendant violates a stay “where the decision
10 to dismiss first requires the court to consider other issues presented by or related to the underlying
11 case.” *Dean*, 72 F.3d at 756. “In other words, thinking about the issues violates the stay.” *Id.*
12 (dismissal violated automatic stay where it “required the court to decide whether the law-of-the-
13 case precluded finding TWA liable to Dean.”; “By contrast, in *IUFA*, the motion to dismiss had
14 nothing to do with the issues arising out of *IUFA*’s grievance. It merely asked the court to
15 recognize that *IUFA* no longer wished to litigate.”)

16 The parties in this case have not adequately addressed the impact of the automatic stay,
17 either in relation to the motion currently before the court or to the proceedings as a whole.
18 Defendants simply assert this matter should be dismissed in its entirety. Plaintiff has not yet
19 responded to the motion to dismiss as it relates to Mohammad. Arguably, consideration of some
20 of defendants’ arguments in favor of dismissal could require consideration of issues presented by
21 or related to the underlying case against Mohammad.

22 Given the inadequacy of the briefing and information as to the automatic stay, the Court
23 herein addresses the motion to dismiss only as to defendants Naem and Suid Trucking, and denies

1 the motion as to defendant Mohammad in light of the automatic stay. For the reasons discussed
2 below, the Court finds the claims against Suid Trucking properly dismissed without prejudice, but
3 no basis for dismissing the claims against Naem. The Court further finds necessary input from the
4 parties as to the impact of the bankruptcy stay on these proceedings subsequent to the ruling on
5 the motion to dismiss. The parties shall provide that input in accordance with the deadline set
6 forth below.

7 B. Failure to State a Claim

8 In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court must
9 determine whether the complaint alleges factual allegations stating a claim for relief that is
10 “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp.*
11 *v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads
12 factual content that allows the court to draw the reasonable inference that the defendant is liable
13 for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). While detailed factual
14 allegations are not necessary, a complaint must offer “more than labels and conclusions” and
15 contain more than a “formulaic recitation of the elements of a cause of action[.]” *Twombly*, 550
16 U.S. at 555. Dismissal is appropriate if the complaint fails to state a cognizable legal theory or
17 fails to provide sufficient facts to support a claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749
18 F.2d 530, 534 (9th Cir. 1984).

19 The Court accepts all facts alleged in the complaint as true, and draws all inferences in the
20 light most favorable to the non-moving party. *Barker v. Riverside County Office of Educ.*, 584
21 F.3d 821, 824 (9th Cir. 2009). The Court is not bound to accept the non-moving party’s legal
22 conclusions. *Iqbal*, 556 U.S. at 678. The ultimate question of whether a plaintiff’s allegations
23 have merit “can be explored in discovery and, if necessary, at trial.” *Bridges v. Gilbert*, 557 F.3d

1 541, 552 (7th Cir. 2009).

2 As a general matter, the Court may not consider material beyond the complaint in ruling
3 on a Rule 12(b)(6) motion. *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001). Exceptions to
4 this rule include material properly submitted as a part of the complaint, and documents not
5 physically attached to the pleading if the contents are alleged in the complaint and no party
6 questions the authenticity. *Id.* In addition, under Federal Rule of Evidence 201, a court may take
7 judicial notice of “‘matters of public record.’” *Id.* at 688-89 (quoting *Mack v. South Bay Beer*
8 *Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)). Specifically, a court may take judicial notice of a
9 fact “not subject to reasonable dispute” because the fact “can be accurately and readily determined
10 from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2).

11 Plaintiff alleges Mohammad participated in the auction “as an agent and on behalf of his
12 company, Suid Trucking, without disclosing that fact when he signed the Agreement and placed
13 his bids[.]” (Dkt. 1, ¶4.16.) Defendants contend plaintiff fails to state a claim against Suid
14 Trucking because Suid Trucking was neither a party to the Agreements, nor a principal of any
15 individual defendant allowing for liability under a theory of agency. Because they were executed
16 by Naem and Mohammad individually, with no reference to Suid Trucking (*see id.*, Exs. A-B), it
17 appears undisputed Suid Trucking was not a party to the Agreements. The Court, therefore,
18 considers whether plaintiff states a claim against Suid Trucking under a theory of agency.

19 An agency relationship arises “‘when two parties consent that one shall act under the
20 control of the other.’” *Wash. Imaging Servs., LLC v. Wash. State Dep’t of Revenue*, 171 Wn.2d
21 548, 563, 252 P.3d 885 (2011) (quoting *Rho Co. v. Dep’t of Revenue*, 113 Wn. 2d 561, 570, 782
22 P.2d 986 (1989), and Restatement (Third) of Agency § 1.01 (2006) (“Agency is the fiduciary
23 relationship that arises when one person (a ‘principal’) manifests assent to another person (an

1 ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and
2 the agent manifests assent or otherwise consents so to act.”)). An agent’s authority to bind a
3 principal may be actual or apparent. *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994);
4 *Hoglund v. Meeks*, 139 Wn. App. 854, 866, 170 P.3d 37 (2007).⁴ Both types of authority “depend
5 upon objective manifestations made by the principal.” *King*, 125 Wn.2d at 507. “With actual
6 authority, the principal’s objective manifestations are made to the agent; with apparent authority,
7 they are made to a third person.” *Id.* Manifestations of apparent authority must cause the third
8 party to actually or subjectively believe the agent has the authority to act for the principal, and that
9 belief must be objectively reasonable. *Id.* Ultimately, the party asserting agency bears the burden
10 of proving the existence of the agency relationship. *Holst v. Fireside Realty, Inc.*, 89 Wn. App.
11 245, 255-56, 948 P.2d 858 (1997).

12 Suid Trucking is a Florida limited liability company (LLC). (Dkt. 1, ¶2.4.) The Florida
13 Revised Limited Liability Company Act, §§ 605.0101 *et seq.*, Fla. Stat. (2016) (LLC Act) provides
14 that authorized representatives may form an LLC “by signing and delivering articles of
15 organization to the [Florida Department of State] for filing[,]” and an LLC is formed when “articles
16 of organization become effective under s. 605.0207[.]” Fla. Stat. § 605.0201(1), (4). Pursuant to
17 § 605.0207 of the LLC Act, a record filed with the department is effective “on the date and at the
18 time the record is filed as evidenced by the department’s endorsement of the date and time on the
19 record.”

20 Defendants provide the Articles of Incorporation for Suid Trucking with their motion to
21 dismiss. (Dkt. 14-1, Ex. A.) The articles identify Mohammad, Naem, and Omar Suid as the
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23 ⁴ “Actual authority may be express or implied. Implied authority is actual authority,
circumstantially proved, which the principal is deemed to have actually intended the agent to possess.”
King, 125 Wn.2d at 507.

1 persons authorized to manage Suid Trucking, and reflect the incorporation date of March 17, 2016,
2 a date falling a month after the February 15, 2016 Ritchie Bros. auction.⁵ (*Id.*) As defendants
3 suggest, Articles of Incorporation “fall directly into the category of items that the Ninth Circuit
4 generally considers proper for judicial notice[,]” and may be considered without converting a Rule
5 12(b)(6) motion into a motion for summary judgment. *Grassmueck v. Barnett*, 281 F. Supp.2d
6 1227, 1231-32 (W.D. Wash. 2003) (citing *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504
7 (9th Cir. 1986)). Defendants argue that, given the incorporation date, plaintiff’s claims against
8 Suid Trucking, under any possible theory of agency, are irreparably flawed and subject to
9 dismissal. That is, because Suid Trucking did not exist at the time of the auction, neither
10 Mohammad, nor Naem could have been acting as its agent. Plaintiff responds that the exact date
11 of Suid Trucking’s formation is an issue that should be resolved through discovery, and that the
12 allegation of an agency relationship suffices to withstand the motion to dismiss.⁶

13 The existence of an agency relationship ordinarily presents a question of fact, properly
14 considered by the trier of fact. *Pac. Can Co. v. Hewes*, 95 F.2d 42, 46 (9th Cir. 1938); *Unruh v.*
15 *Cacchiotti*, 172 Wn.2d 98, 114, 257 P.3d 631 (2011). However, it does not follow that the mere
16 allegation of an agency relationship suffices to withstand a Rule 12(b)(6) motion to dismiss. While
17 the Court must take the allegations of material fact as true and in the light most favorable to
18 plaintiff, it need not “accept as true allegations that contradict matters properly subject to judicial
19 notice or by exhibit.” *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001),
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21 ⁵ Initially, defendants inaccurately alleged a full year between the auction and the incorporation
date. (See Dkt. 14 at 2; *but see* Dkts. 22 and 23-1 (correcting error).)

22 ⁶ Plaintiff further rejects any contention Naem and Mohammad could not be held liable in the
23 absence of an agency relationship given that, at the time they incurred their debts, they had already formed
a general partnership under Florida law. This argument does not, however, provide any basis for stating a
claim against Suid Trucking.

1 *modified on other grounds*, as stated in 275 F.3d 1187 (9th Cir. 2001). “Nor is the court required
2 to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or
3 unreasonable inferences.” *Id.*

4 While “the precise details of the agency relationship need not be pleaded to survive a
5 motion to dismiss, sufficient facts must be offered to support a reasonable inference that an agency
6 relationship existed.” *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1301 (D. Nev.
7 2014) (citing similar conclusion in *Thornes v. IMB Lender Bus. Process Servs., Inc.*, No. C10-
8 1716, 2011 U.S. Dist. LEXIS 15235 at *5 (W.D. Wash. Feb. 15, 2011) (“Because one of the
9 elements of a conspiracy is an agreement to conspire, Plaintiffs must show some factual support
10 to make it plausible that Defendants entered into the agreement.”; concluding plaintiff failed to
11 allege any acts or conduct by defendants suggesting conspiracy was plausible)). *Cf. Orsi v. Aetna*
12 *Ins. Co.*, 41 Wash. App. 233, 239, 703 P.2d 1053 (1985) (while the existence of the agency
13 relationship is ordinarily a question of fact, where “no facts are in dispute and the facts are
14 susceptible of only one interpretation . . . the relationship becomes a question of law.”) Where the
15 facts alleged do not allow for such an inference, dismissal is appropriate. *In re Park W. Galleries,*
16 *Inc.*, No. 09-2076, 2010 U.S. Dist. LEXIS 65197 at *27-28 (W.D. Wash. June 25, 2010) (granting
17 motion to dismiss where plaintiff provided no allegations of fact that could support a finding an
18 agency agreement existed (actual agency), or that an entity’s “conduct or statements caused
19 plaintiff to reasonably believe that an agency relationship existed (apparent agency).”)

20 Plaintiff supports its allegation of an agency relationship between Mohammad and Suid
21 Trucking with information obtained from Stone, Naem’s attorney and the registered agent for Suid
22 Trucking. (Dkt. 1, ¶¶4.16, 4.23.) Plaintiff alleges Stone informed plaintiff’s counsel on July 28,
23 2017, more than a year-and-a-half after the auction, Mohammad participated in the auction “on

1 behalf of Suid Trucking.” (*Id.*) A July 28, 2017 e-mail from Stone to plaintiff’s counsel states:
2 “Apparently [Mohammad] became confused, and in certain cases as part of the equipment auction,
3 utilized the [bidder] number utilized by [Naem] when bidding on certain equipment pieces. The
4 equipment was for his truck hauling business.” (Dkt. 21, Ex. A.)⁷ Plaintiff alleges its counsel
5 sought payment through Stone on several occasions, asserting Naem and Mohammad acted in
6 concert to make purchases for Suid Trucking. (Dkt. 1, ¶4.23.)

7 The facts alleged by plaintiff provide support for a contention Mohammad bid on items
8 intended for use in the operation of a trucking business. However, Suid Trucking’s March 17,
9 2016 Articles of Incorporation contradict any inference the LLC existed either at the time of the
10 February 15, 2016 auction or at the time Mohammad failed to tender payment in accordance with
11 the terms of the Agreement. (*See id.*, Ex. B (requiring full payment within seven days of the
12 auction’s completion).) Prior to its existence, Suid Trucking could not assent to an agency
13 relationship or make or allow for the objective manifestations necessary to create an actual or
14 apparent agency relationship. *See generally Bain v. Metropolitan Mortgage Group, Inc.*, 175
15 Wn.2d 83, 107, 285 P.3d 34 (2012) (“[A]gency requires a specific principal that is accountable for
16 the acts of its agents.”).⁸

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18 ⁷ The email is not attached to the complaint, but the communications contained within are
19 referenced in paragraph 4.22. (Dkt. 1.) While defendants take issue with the complaint’s depiction of
20 Stone’s statement and any implications in relation to plaintiff’s claims, they do not dispute the authenticity
21 of the e-mail. Accordingly, the Court finds the July 28, 2017 e-mail incorporated by reference into the
22 complaint. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (documents are
23 judicially noticeable under the “incorporation by reference” doctrine if their content is referenced in the
complaint and their authenticity is not in dispute); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.
2005) (doctrine of incorporation by reference extends to documents “not physically attached to the
pleading”). The Court does not, however, consider the belatedly submitted Declaration of Stephen Stone
(Dkt. 28), or any other materials beyond the complaint and not qualifying as an exception to materials
properly considered in relation to a Rule 12(b)(6) motion.

⁸ Also, plaintiff depicts Suid Trucking as an “undisclosed” principal at the time of the auction.
(*See* Dkt. 1, ¶4.16); and Restatement (Third) Of Agency § 1.04 (“A principal is undisclosed if, when an

1 Nor does there appear to be any other viable alternative claim as to Suid Trucking. Suid
2 Trucking could not, for example, be said to have ratified the Agreement. *See, e.g., Spokane*
3 *Concrete v. U.S. Bank*, 126 Wash. 2d 269, 278, 892 P.2d 98 (1995) (a corporation may ratify a
4 contract where it retains and uses the benefit obtained) (citing *Pierce v. Astoria Fish Factors, Inc.*,
5 31 Wn. App. 214, 218-19, 640 P.2d 40 (1982) (“If a corporation, with knowledge of the facts,
6 accepts the benefit of an unauthorized transaction by one of its officers, or where it received or
7 retains and uses money paid to it by the other party, it thereby ratifies the transaction, or will be
8 estopped to deny ratification.”)), and *Kraft v. Spencer Tucker Sales*, 39 Wn.2d 943, 953-54, 239
9 P.2d 563 (1952) (“Ratification presupposes a principal existing at the time of the agent’s action[.]”
10 and “[b]oth ratification and adoption [of a contract] presuppose that the acts ratified or adopted
11 were performed by one who purported to act on account of another.”; concluding a contract “was
12 not capable of ratification or adoption by the corporation thereafter organized.”); *accord*
13 Restatement (Third) of Agency §§ 4.03, 4.04, and 6.04. Also, the allegation Mohammad acted on
14 behalf of Suid Trucking “without disclosing that fact” precludes holding Mohammad liable as a
15 promoter or promisor of the subsequently formed Suid Trucking, LLC. *See, e.g., White v. Dvorak*,
16 78 Wash. App. 105, 112-14, 896 P.2d 85 (1995) (“When a person enters into a contract in the
17 name of a corporation, and the corporation is subsequently formed, both the individual and the
18 corporation are party promisors to the contract unless the other party knew of the nonexistence and

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20 _____
21 agent and a third party interact, the third party has no notice that the agent is acting for a principal.”). As
22 an undisclosed principal, Suid Trucking could be held liable only with a showing Mohammad acted with
23 actual authority and Suid Trucking was not excluded by the contract. Restatement (Third) of Agency §
6.03 (unless excluded by the contract, the undisclosed principal is a party to the contract, the agent and the
third party are parties to the contract, and the principal and the third party have the same rights, liabilities,
and defenses against each other as if the principal made the contract personally); *id.* cmt. (c) (“An agent
does not act with apparent authority with regard to an undisclosed principal because the principal has made
no manifestation requisite for apparent authority.”)

1 agreed to look solely to the corporation.”; “An enforceable contract can exist only if the person
2 purporting to act as a corporation is a party to the contract because the corporation lacks existence
3 and cannot be bound.”).

4 Plaintiff fails to plead facts allowing for an inference an agency relationship existed at the
5 time Mohammad entered into the Agreement, and its claim against Suid Trucking is properly
6 dismissed. Plaintiff, however, asserts other evidence could support an earlier date of incorporation,
7 and request the opportunity to be heard on “countervailing evidence” omitted from defendants’
8 motion. (Dkt. 18 at 4, n.4.) The Court therefore exercises its discretion to dismiss Suid Trucking
9 without prejudice to the submission of an amended pleading. *See Vess v. Ciba-Geigy Corp.*, 317
10 F.3d 1097, 1108 (9th Cir. 2003) (dismissals under Rule 12(b)(6) “should ordinarily be without
11 prejudice”); *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242, 247 (9th Cir. 1990)
12 (on a Rule 12(b)(6) motion, “a district court should grant leave to amend even if no request to
13 amend the pleading was made, unless it determines that the pleading could not possibly be cured
14 by the allegation of other facts.”).

15 C. Subject Matter Jurisdiction

16 Pursuant to 28 U.S.C. § 1332(a), the Court has subject matter jurisdiction over this case so
17 long as there is complete diversity of citizenship between the opposing parties and the amount in
18 controversy exceeds \$75,000. *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1181 (9th Cir. 2004). In
19 seeking dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), defendants aver
20 plaintiff fails to meet either the amount in controversy or total diversity requirements. Plaintiff, as
21 the party asserting jurisdiction, bears the burden of proving all jurisdictional facts. *Indus.*
22 *Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990). If determining at any time it
23 lacks subject matter jurisdiction, the court must dismiss the action. Fed R. Civ. P. 12(h)(3).

1 1. Diversity of citizenship:

2 For purposes of diversity jurisdiction, a corporation is a citizen of its state of incorporation
3 and of the state where its principal place of business is located. 28 U.S.C. § 1332(c)(1). A
4 corporation's principal place of business, or "nerve center," is the place where the corporation's
5 high level officers direct, control, and coordinate its activities. *Hertz Corp. v. Friend*, 559 U.S.
6 77, 80-81 (2010).

7 The complaint identifies Naem and Mohammad as maintaining current addresses in
8 Florida, and Ritchie Bros. as a Washington State corporation, with corporate offices in Lincoln
9 Nebraska. (Dkt. 1, ¶¶1, 2.2-2.3.) It avers complete diversity of citizenship between the opposing
10 parties. (*Id.*, ¶3.1.) Defendants state Ritchie Bros. is a wholly owned subsidiary of a Canadian
11 corporation and "does very substantial business in the State of Florida." (Dkt. 14 at 11.)⁹ They
12 contend Ritchie Bros. is a citizen of Canada, Nebraska, and Florida, and that its Florida citizenship
13 precludes a finding of complete diversity.

14 Plaintiff sufficiently identified its state of incorporation and the state containing its
15 corporate offices for purposes of establishing diversity jurisdiction. *See Harris v. Rand*, 682 F.3d
16 846, 850-51 (9th Cir. 2012) ("*Hertz* provided a uniform test for courts to apply when determining
17 the principal place of business for federal diversity jurisdiction purposes[.]" and did not require a
18 complaint "plead that a corporate party's 'nerve center' is located in a particular place.") Neither
19 the Canadian location of Ritchie Bros.' parent company, nor the fact Ritchie Bros. conducts
20 business in Florida undermines the allegation of total diversity. In fact, documents provided by

21 _____
22 ⁹ Defendants request the Court take judicial notice of corporate registration documents and annual
23 reports for Ritchie Bros. (*See* Dkt. 14 at 16 and Exs. B-C.) As defendants also observe, the Court "is not
restricted to the face of the pleadings[]" in considering a Rule 12(b)(1) motion to dismiss, and "may review
any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of
jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

1 defendants show that, while authorized to conduct business in Florida, Ritchie Bros. maintains its
2 “Current Principal Place of Business” in Lincoln, Nebraska. (Dkt. 14, Exs. B-C.) *Cf. Harris*, 682
3 F.3d at 651-52 (a court may require a more specific pleading where an allegation as to the principal
4 place of business is “implausible” or may require more information or proof where doubts as to
5 diversity exist; concluding district court erred in dismissing an amended complaint without
6 prejudice, thereby precluding the filing of a further amended complaint). Plaintiff satisfies the
7 total diversity requirement for subject matter jurisdiction.¹⁰

8 2. Amount in controversy:

9 In considering the amount in controversy, the Court first looks to the face of the complaint.
10 *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015). “Generally, ‘the sum claimed
11 by the plaintiff controls if the claim is apparently made in good faith.’” *Id.* (quoting *St. Paul*
12 *Mercury Indem. Co. v. Red Cab. Co.*, 303 U.S. 283, 289 (1938)). “‘To justify dismissal, it must
13 appear to a legal certainty that the claim is really for less than the jurisdictional amount.’”
14 *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102 (9th Cir. 2010) (quoting *Crum v.*
15 *Circus Circus Enters.*, 231 F.3d 1129, 1131 (9th Cir. 2000)). Under this “‘legal certainty’”
16 standard, the court has subject matter jurisdiction over the dispute “unless ‘upon the face of the
17 complaint, it is obvious that the suit cannot involve the necessary amount.’” *Id.* (quoting *St. Paul*
18 *Mercury Indemnity Co.*, 303 U.S. at 292). This standard makes it “very difficult” to secure

20 ¹⁰ The citizenship of an LLC is determined by examining the citizenship of the owners/members.
21 See *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) (holding that “like a
22 partnership, an LLC is a citizen of every state of which its owners/members are citizens.”). Plaintiff failed
23 to correctly identify the authorized members of Suid Trucking in the complaint. (*Compare* Dkt. 1
(identifying Mohammad and Natasha Suid as authorized members), *with* Dkt. 14, Ex. A at 2 (identifying
Mohammad, Omar, and Naem Suid as authorized members).) Should plaintiff seek to file an amended
complaint naming Suid Trucking as a defendant, it must correctly identify and allege the citizenship of each
owner/member of the LLC.

1 dismissal of a case for apparent failure to satisfy the amount in controversy requirement:

2 “Only three situations clearly meet the legal certainty standard: 1) when the terms
3 of a contract limit the plaintiff’s possible recovery; 2) when a specific rule of law
4 or measure of damages limits the amount of damages recoverable; and 3) when
independent facts show that the amount of damages was claimed merely to obtain
federal court jurisdiction.”

5 *Naffe v. Frey*, 789 F.3d 1030, 1040 (9th Cir. 2015) (quoting *Pachinger v. MGM Grand Hotel-Las*
6 *Vegas, Inc.*, 802 F.2d 362, 364 (9th Cir. 1986) (quoted source omitted)).

7 With respect to the remaining, individual defendants, the Complaint identifies amounts of
8 \$53,342.50 and \$116,862.50 in relation to the two bidder account numbers, and a total amount in
9 controversy of \$170,205.00. (Dkt. 1, ¶4.20.) Plaintiff alleges defendants acted in concert at the
10 auction, with Naem’s bids made either personally or through Mohammad, and that defendants are
11 jointly and severally liable for the total combined debt of \$170,205.00. (*Id.*, ¶¶4.17, 4.20, 4.23,
12 5.2-5.10.) Plaintiff also, in response to the motion to dismiss, argues Naem and Mohammad had
13 formed a general partnership under Florida law at the time they placed their bids.

14 Defendants aver the causes of action against the individual defendants stem from two
15 wholly independent contracts and give rise to discrete, unrelated claims. They deny any basis for
16 aggregating the discrete claims and assert that, with damages totaling only \$53,342.50, plaintiff
17 does not meet the amount in controversy requirement as to Naem. Defendants argue plaintiff fails
18 to meet the legal certainty standard. They contend a lack of good faith is evidenced in the
19 concocting of a claim against Suid Trucking knowing that diversity jurisdiction would not
20 otherwise obtain as to Naem, and in the belated assertion of a partnership as an improper end-run
21 argument to obtain jurisdiction. Defendants note plaintiff did not plead a partnership in the
22 complaint and deny any basis or support for such a claim. (*See* Dkt. 23-1 at 9-11.)

23 Unrelated claims against separate defendants may not be aggregated to reach the amount

1 in controversy requirement. *See Libby, McNeill & Libby v. City Nat. Bank*, 592 F.2d 504, 510 (9th
2 Cir. 1978). “The tests for aggregating claims of one plaintiff against claims of multiple defendants
3 and of multiple plaintiffs against one defendant are ‘essentially the same: . . . the plaintiff’s claims
4 against the defendants must be common and undivided so that the defendants’ liability is joint and
5 not several.’” *Id.* (quoting *United States v. So. Pac. Transp. Co.*, 543 F.2d 676, 683 n. 9 (9th Cir.
6 1976)). *See also Middle Tenn. News Co. v. Chamel of Cincinnati, Inc.*, 250 F.3d 1077, 1081 (7th
7 Cir. 2001) (“In diversity cases, when there are two or more defendants, plaintiff may aggregate the
8 amount against the defendants to satisfy the amount in controversy requirement only if the
9 defendants are jointly liable; however, if the defendants are severally liable, plaintiff must satisfy
10 the amount in controversy requirement against each individual defendant.”); *Alberty v. Western*
11 *Sur. Co.*, 249 F.2d 537, 538 (10th Cir. 1957) (“[W]here a single plaintiff has multiple claims ...
12 against two or more defendants jointly, and the claims are of such character that they may properly
13 be joined in one suit, the aggregate amount thereof is for the purpose of federal jurisdiction the
14 amount in controversy.”)

15 Again, plaintiff alleges defendants acted in concert at the auction and are jointly and
16 severally liable in incurring a combined debt of \$170,205.00. Looking to the face of the complaint,
17 the Court finds plaintiff’s claims common and undivided and the amount in controversy
18 requirement satisfied. *See, e.g., Winner’s Circle of Las Vegas, Inc. v. AMI Franchising, Inc.*, 916
19 F. Supp. 1024, 1028 (D. Nev. 1996) (“Winner’s alleges a fraud / conversion claim against both
20 AMI and L & H, acting in concert, so that Winner’s claim against AMI and L & H is common and
21 undivided.”)

22 The Court finds no basis for concluding the allegations in the complaint were not made in
23 good faith. It is true that, in the absence of some contradictory evidence from or viable alternative

1 claim by plaintiff, the Articles of Incorporation preclude the inclusion of Suid Trucking as a
2 defendant under a theory of agency. However, the complaint and the evidence referenced therein
3 provide a reasonable explanation as to why plaintiff named Suid Trucking as a party. Nor is the
4 Court persuaded plaintiff's partnership argument serves as an independent fact showing damages
5 claimed merely to obtain federal court jurisdiction, or that an analysis as to the potential merit of
6 such a claim is warranted at this juncture. At best, the introduction of this argument could warrant
7 an opportunity to amend. As it stands, it does not appear to a legal certainty or obvious from the
8 face of the complaint that the amount in controversy falls below that required to establish
9 jurisdiction in this Court. *See Naffe*, 789 F.3d at 1040 ("It is true that some cases warrant a more
10 thorough inquiry into the facts underpinning jurisdiction than the legal certainty test permits. For
11 example, where a party seeks to remove a case from state to federal court under 28 U.S.C. § 1441,
12 the proponent of removal bears the burden of establishing federal jurisdiction by a preponderance
13 of the evidence. But that more searching inquiry is inapplicable where, as here, the plaintiff files
14 suit originally in federal court, the case raises traditional state tort claims, and the complaint
15 affirmatively alleges that the amount in controversy exceeds the jurisdictional threshold. In such a
16 case, the legal certainty test applies, and the district court must accept the amount in controversy
17 claimed by the plaintiff unless it can declare to a legal certainty that the case is worth less.")
18 (internal and other case citations omitted).

19 D. Insufficient Service of Process

20 Federal Rule of Civil Procedure 4(e) provides for service on an individual by "following
21 state law for serving a summons in an action brought in courts of general jurisdiction in the state
22 where the district court is located or where service is made[.]" Fed. R. Civ. P. 4(e)(1). Defendants
23 state that Florida law provides for service on a person or at the person's usual place of abode with

1 a resident therein. Fla. Stat. § 48.031(1)(a). They argue plaintiff failed to meet the requirements
2 for service as to Naem and seek his dismissal from this case for insufficient service of process
3 pursuant to Rule 12(b)(5).¹¹

4 Once challenged, a plaintiff bears the burden of establishing the validity of service.
5 *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). A plaintiff meets the prima facie burden
6 by producing the process server's affidavit of service. *Dimaio v. Cty. of Snohomish*, No. 17-0128,
7 2017 U.S. Dist. LEXIS 121698 at *4 (W.D. Wash. Aug. 1, 2017) (cited case omitted). Barring
8 some defect shown on the face of the return, dismissal under Rule 12(b)(5) requires the production
9 by defendant of affidavits, discovery materials, or other admissible evidence establishing the
10 absence of valid service. *Id.* The burden then shifts back to plaintiff to present evidence showing
11 proper service or creating an issue of fact necessitating resolution through an evidentiary hearing.
12 *Id.* at *5.

13 The evidence shows plaintiff unsuccessfully attempted to serve Naem at two different
14 locations in which he was known or thought to maintain a personal residence and/or receive mail.
15 (See Dkt. 20, ¶¶3, 5-7, 9 and Exs. A-B.) Plaintiff contends it nonetheless properly completed
16 substitute service on Naem pursuant to Fla. Stat. § 48.031(2)(b), which allows for service on “an
17 individual doing business as a sole proprietorship at his or her place of business, during regular

18
19 ¹¹ Defendants observe that this argument is also grounded in a lack of personal jurisdiction, assert
20 Rule 12(b)(2) applies as a basis for dismissal for the same reasons asserted in relation to Rule 12(b)(5), and
21 note their intention to preserve this defense for purposes of Rule 12(g). A federal court cannot exercise
22 jurisdiction over a defendant unless the defendant has been properly served under Rule 4. *Direct Mail*
23 *Specialists, Inc. v. Eclat Computerized Techs.*, 840 F.2d 685, 688 (9th Cir. 1988). Without substantial
compliance with Rule 4, “neither actual notice nor simply naming the defendant in the complaint will
provide personal jurisdiction.” *Id.* (quoting *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986), *amended*,
807 F.2d 1514 (9th Cir. 1987)). Plaintiff bears the burden to establish the court's personal jurisdiction over
a defendant. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). The Court herein directs its analysis
to the Rule 12(b)(5) motion and arguments contained in the parties' briefing. The Court also finds no need
to address various alternative suggestions and requests set forth in defendants' briefing. (See, e.g., Dkt. 14,
nn. 2, 4.)

1 business hours, by serving the person in charge of the business at the time of service if two attempts
2 to serve the owner have been made at the place of business.” That is, Naem operates a business
3 named “34th Street Crossing Shopping Center LLC,” located at 2900 34th Street South, St.
4 Petersburg, Florida 33711, of which he is the sole member, and the process server left the summons
5 and complaint with Omar Suid, the person in charge of a furniture store located at 2906 34th Street
6 South in St. Petersburg. (Dkt. 20, Exs. A-C.) Plaintiff also contends that, in the event Naem is
7 found to be a nonresident who engages in business at that Florida location, service was properly
8 effected pursuant to Fla. Stat. § 48.071. (*See id.*, ¶11 and Exs. C-D.) That provision allows for
9 service on agents of nonresidents (someone “not residing or having a principal place of business”
10 in the state) engaging in business in the state, through service “on the person who is in charge of
11 any business” in which the defendant is engaged, and by mailing a copy of the process and notice
12 of service to the nonresident. Fla. Stat. § 48.071. Plaintiff alternatively requests leave to use
13 Florida’s last-resort provision for service on nonresidents who do business in Florida while
14 concealing their whereabouts. Fla. Stat. § 48.181.

15 Defendants deny the sufficiency of service. They note, for example, that Naem’s shopping
16 center business is a registered LLC, not a sole proprietorship, and that service was attempted on a
17 person at a furniture store tenant located within the shopping complex (at 2906 34th St.), not at the
18 shopping center itself (at 2900 34th St.) or on a person in charge of the shopping center business.
19 (Dkt. 20, Exs. A-C.) Defendants also reject the applicability of the provisions allowing for service
20 on nonresidents, stating it is both alleged by plaintiff and undisputed that Naem is a resident of
21 Florida, and asserting that, even if he was not a Florida resident, the service on and mailing to a
22 business in which he is not engaged would not suffice.

23 Defendants appear to demonstrate inadequate service on Naem under Fla. Stat. §

1 48.031(2)(b). Also, in the absence of additional information regarding Naem's residence, it is not
2 clear whether service could be effected pursuant to §§ 48.071 or 48.181. The Court does not,
3 however, find dismissal of the claims against Naem warranted.

4 Rule 4 is appropriately afforded a "liberal and flexible construction." *Borzeka v. Heckler*,
5 739 F.2d 444, 447 (9th Cir. 1984). *Accord Direct Mail Specialists, Inc. v. Eclat Computerized*
6 *Techs.*, 840 F.2d 685, 688 (9th Cir. 1988); *FCW, Locals 197 & 373 v. Alpha Beta Co.*, 736 F.2d
7 1371, 1382 (9th Cir. 1984). Failure to strictly comply with service requirements does not warrant
8 dismissal if: "(a) the party that had to be served personally received actual notice, (b) the defendant
9 would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure
10 to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were
11 dismissed." *Borzeka*, 739 F.2d at 447.

12 The Court has broad discretion to either dismiss a complaint or quash an attempted service
13 of process. *S.J. v. Issaquah Sch. Dist. No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006) (citing *Stevens*
14 *v. Sec. Bank Pac. Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir. 1976)). Where service may yet be
15 accomplished and there is no unfair prejudice to the defendant, a court should quash service, rather
16 than dismiss the action, and permit the plaintiff to effect proper service. *Wick Towing, Inc. v.*
17 *Northland*, No. C15-1864, 2016 U.S. Dist. LEXIS 80802 at *6 (W.D. Wash. June 21, 2016) (citing
18 *Umbenhauer v. Woog*, 969 F.2d 25, 30 (3d Cir. 1992)).

19 In addition, although requiring service within ninety days after the filing of a complaint,
20 Rule 4(m) "contemplates the possibility of an extension of time." *S.J.*, 470 F.3d at 1293. *See also*
21 *Fed. R. Civ. P. 4(m)*. A court must extend Rule 4(m)'s ninety-day time period if the plaintiff
22 shows good cause for failure to timely serve a defendant and, even without good cause, a court has
23 broad discretion to extend the time for service. *Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir.

2007); Fed. R. Civ. P. 4(m). In exercising its discretion, the court may consider factors such as the length of delay in proper service, actual notice of the lawsuit, prejudice to the defendant, and the statute of limitations. *Efaw*, 473 F.3d at 1040-41.

Having now considered the facts as related to the attempted service and other relevant factors, the Court finds dismissal would not be appropriate and that additional time to effect service on Naem is warranted. There is actual notice of the lawsuit, the delay in service is relatively minimal, defendants do not demonstrate undue prejudice, and it is apparent plaintiff would be prejudiced by dismissal. Plaintiff's failure to effect proper service is justifiable in light of the lack of clarity as to Naem's location, place of residence, and business endeavors. There is, at the same time, a reasonable prospect plaintiff could obtain additional information and effect proper service if afforded the opportunity. The Court, therefore, rejects the request to dismiss for insufficient service of process, quashes the attempted service, and grants plaintiff an additional ninety days to serve Naem.

E. Rule 11 Sanctions

Local Civil Rule (LCR) 11 provides for costs and sanctions where an attorney or party "without just cause" fails to comply with procedural rules or a court order, presents unnecessary motions or unwarranted oppositions to motions, or "fails to prepare for presentation to the court, or who otherwise so multiplies or obstructs the proceedings in a case[.]" LCR 11(c). Defendants seek sanctions for the commencement of this action against Suid Trucking "when a modicum of due diligence would have revealed" no cause of action could stand, and because of the expenses incurred in filing the motion under consideration. (Dkt. 14 at 13.) They specifically request payment of the costs and reasonable attorneys' fees associated with their motion.

As plaintiff observes, defendants did not comply with the requirements to file a motion for

1 sanctions separately from any other motion and to allow twenty-one days after service on another
2 party before filing with the Court. Fed. R. Civ. P. 11(c)(2). Plaintiff also submitted a surreply
3 asserting misrepresentations in defendants' reply and praecipe accompanying a revised reply.
4 (Dkts. 22, 23, 23-1, and 26.) While declining to delve into the accusations as to representations
5 made, the Court has no difficulty in concluding sanctions are not warranted. As indicated above,
6 the Court finds a reasonable explanation for the naming of Suid Trucking as a defendant, and does
7 not exclude the possibility Suid Trucking could be properly named as a defendant in an amended
8 complaint. The circumstances do not support the imposition of Rule 11 sanctions.

9 CONCLUSION

10 Defendants' motion to dismiss (Dkt. 14) is DENIED as to Mohammad in light of the
11 automatic stay and, as to Naem and Suid Trucking, is GRANTED in part and DENIED in part.
12 The Rule 12(b)(6) motion is GRANTED and plaintiff's claims against Suid Trucking are
13 DISMISSED without prejudice to submission of an amended pleading. The Rule 12(b)(1) and
14 Rule 12(b)(5) motions are DENIED, but the attempted service on Naem is quashed and plaintiff
15 is granted an additional **ninety (90) days** to effect service. The request for sanctions is DENIED.

16 The Court further directs the parties to meet and confer and to provide input to the Court
17 as to the status of these proceedings in light of the automatic stay. Any submission with regard to
18 the stay should not exceed **ten (10) pages** in length and must be filed on or before **February 23,**
19 **2018**. The Clerk is directed to send a copy of this Order to the parties.

20 DATED this 6th day of February, 2018.

21
22 
23 Mary Alice Theiler
United States Magistrate Judge